

STATE OF MICHIGAN
COURT OF APPEALS

DEBBIE LASHER, Personal Representative of the
Estate of BERNICE BURNS, Deceased,

Plaintiff-Appellant,

v

ROD WRIGHT, DPM,

Defendant-Appellee.

UNPUBLISHED
May 17, 2005

No. 250954
Iosco Circuit Court
LC No. 00-002622-NH

Before: Saad, P.J. and Smolenski and Cooper, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from an order on reconsideration denying plaintiff's motion for judgment notwithstanding the verdict or new trial. We hold that, under the unique circumstances presented by this case, the trial court abused its discretion when, on reconsideration, it chose to reverse its earlier decision to grant plaintiff a new trial.

I.

Defendant is a podiatrist who treated the decedent for various foot ailments over a period of years. On August 22, 1997, defendant removed part of the decedent's toe. The decedent contacted defendant over the weekend following the surgery complaining of pain. On August 25, the decedent was admitted to the hospital and her entire toe was amputated on August 28. After the surgery to remove the toe, the decedent was found to have an infection that was resistant to the antibiotics that had been previously prescribed. By September 8, the decedent had become septic. She died the next day.

Plaintiff brought a medical malpractice action against defendant on May 19, 2000. A jury trial was heard before Judge Ernst from April 16 to April 18 of 2002. On the last day of trial, the jury returned a verdict finding that defendant had not been professionally negligent.¹

¹ The jury was presented with a special verdict form with four questions. The first question instructed the jury to find whether defendant had been professionally negligent, and if it found
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On December 10, 2002, plaintiff filed a motion for judgment notwithstanding the verdict (JNOV) or a new trial. On December 16, 2002, Judge Ernst heard arguments on plaintiff's motion. During the motion, both parties spent a considerable amount of time discussing the testimony of defendant's expert witness, Doctor Woodhams. Upon the conclusion of the arguments, the trial court said,

Okay, thank you. I recall the trial, and although I don't recall the specific wording of the – of the question and Doctor Woodhams' specific language in his response, at the moment of Doctor Woodhams' testimony I was struck by the impression that the Plaintiff's – strike that – the Defendant's own witness has sunk the Defendant's ship as far as professional negligence is concerned, and it was my – is my recollection that Doctor Woodhams testified that with a patient of this sort with the circulation problem that she had that the toe should have been removed and not simply a part of the toe to prevent the possibility of some residual infection that would not be amenable to treatment by antibiotic, because the antibiotic wouldn't reach that infected area. So, you take the whole toe to avoid that problem.

The court then proceeded to make its findings, stating,

Based on the testimony of the Defendant's expert here, I do find that as to the issue of standard of care and breach of standard of care that there was such evidence that the verdict of the Jury on that issue was contrary to the great weight of the evidence. Certainly, there are other issues, proximate cause and damages, if proximate cause is found, but I believe in this case, the testimony of both[] Plaintiff's experts and Defendant's expert is such that Motion for a New Trial must be granted, and the same is granted.

After granting the motion for a new trial and a brief exchange with defendant's counsel, the trial court explained again that, although it "recognized that the Appellate Courts of the State do not perhaps look favorably upon professional negligence cases in the medical arena . . . I think this is one that based on the expert[s'] testimony here, including Defendant's expert, another Jury needs to have a look at it." On January 10, 2003, Judge Myles, who replaced the now retired Judge Ernst, entered the order granting plaintiff a new trial. On January 29, 2003, defendant filed a motion for reconsideration of the grant of a new trial on the grounds that the trial court did not correctly recall Woodhams' testimony and applied the wrong legal standard. On February 11, 2003, Judge Myles granted defendant's motion and vacated the previous grant of a new trial.² In his order, Judge Myles explained,

I have reviewed the trial transcript testimony of Dr. Lawrence E. Woodhams, as well as the transcript of the motion hearing wherein Judge Ernst set forth his

(...continued)

that he had not been professionally negligent, to make no further findings.

² The record contains no evidence that Judge Myles held a hearing to consider defendant's motion to reconsider.

findings of fact based on his recollection, and I find that the findings of fact made by Judge Ernst are clearly erroneous and must be set aside.

Plaintiff then appealed to this Court, but this Court dismissed the claim of appeal for lack of jurisdiction, because the February 11, 2003 order merely vacated the previous order and did not actually rule upon plaintiff's motion for a new trial. See *Lasher v Wright*, unpublished order of the Court of Appeals, entered May 20, 2003 (Docket No. 246995). Upon plaintiff's motion, on August 29, 2003, the trial court entered an order denying the motion JNOV or for a new trial, which plaintiff then appealed as of right.

II.

Plaintiff argues on appeal that the trial court erred when it vacated the earlier order granting plaintiff's motion JNOV or for a new trial and subsequently entered a denial of the same motion without examining all the trial testimony and where defendant's motion for reconsideration was untimely. Because plaintiff failed to object to the timeliness of defendant's motion for reconsideration before the trial court, we decline to review that issue. *Herald Co v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998) ("We need not review issues raised for the first time on appeal although we may do so to prevent manifest injustice."). However, we agree with plaintiff's contention that the trial court abused its discretion by vacating the earlier grant of the motion for a new trial and entering a denial of the same motion without taking into consideration all the testimony.

This Court reviews a trial court's grant of a motion for reconsideration for an abuse of discretion. *Kokx v Bylenga*, 241 Mich App 655, 658; 617 NW2d 368 (2000). An abuse of discretion exists only where "an unprejudiced person, considering the facts on which the trial court [relied], would find no justification or excuse for the ruling made." *People v McSwain*, 259 Mich App 654, 685; 676 NW2d 236 (2004).

In this case, the trial court under Judge Ernst originally granted plaintiff's motion for a new trial on the grounds that the jury's verdict was against the great weight of the evidence. On reconsideration, the trial court under Judge Myles reversed the grant of a new trial by Judge Ernst and denied plaintiff's motion on the sole ground that Judge Ernst based his decision on a clearly erroneous finding regarding defendant's expert's testimony.³ Judge Myles stated that he came to this conclusion after reviewing Woodhams' trial testimony and the transcript of the motion hearing held by Judge Ernst.⁴ While this might be sufficient reason to question the trial court's earlier decision to grant a new trial, the trial court under Judge Myles still had an

³ Under MCR 2.613(B), Judge Myles could properly enter an order vacating the trial court's earlier grant of a new trial.

⁴ As previously noted, the record contains no evidence that the trial court held a hearing on the motion for reconsideration. Because this Court's review is limited to the record established by the trial court, *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002), we are compelled to evaluate the appropriateness of the trial court's decision to grant the motion for reconsideration solely upon the reasons stated in its written order of February 11, 2003.

affirmative duty to base its decision to deny plaintiff's motion after reconsideration on a review of the entire record.⁵ See *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003) ("This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand."). Furthermore, MCR 2.119(F)(3) states that on a motion for reconsideration the moving party must show that there was error that, when corrected, would affect the outcome. See also MCR 2.613(A) (stating that an order will not be vacated, modified, or otherwise disturbed unless refusal to take this action would be inconsistent with substantial justice). Because Judge Ernst based his finding that the jury verdict was against the great weight of the evidence on the testimony of both plaintiff's experts and defendant's expert, Judge Myles could not have adequately determined that any error by Judge Ernst regarding Woodhams' testimony would have altered the outcome without reviewing all the testimony. Consequently, we hold that the trial court under Judge Myles abused its discretion when it granted defendant's motion for reconsideration without reviewing the entire record. Because of our holding, we do not reach the underlying issue of whether plaintiff is entitled to a directed verdict or a new trial.

We reverse the trial court's decision to grant defendant's motion for reconsideration and vacate the trial court's orders of February 11, 2003 and August 29, 2003.

/s/ Michael R. Smolenski

/s/ Jessica R. Cooper

⁵ The propriety of the trial court's earlier decision to grant plaintiff a new trial is not now before us and we decline to review its findings and ultimate decision.